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October 22, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: WRAJ-FM - Anna, Illinois
(BPH-890531IB) *Granted 6.2690*

Dear Ms. Searcy:

This letter is submitted to you in our capacity as Counsel for W. Russell Withers, Jr. ("Withers"), licensee of Radio Stations KAPE(AM)/KGMO(FM), Cape Girardeau, Missouri.

On August 17, 1992, an application was filed to modify the above-referenced CP, on behalf of Union Broadcasting, Inc., licensee of WRAJ-FM, Anna, Illinois ("WRAJ").

Affixed hereto is page 25 from the FCC Form 301 filed by WRAJ, indicating that it has permission from J.W. Davis, the "owner's agent", to locate its antenna on the tower specified by WRAJ.

As the Commission will see by the attached Declaration, prepared by Withers, the tower specified by WRAJ is owned by him. It is a replacement tower for one previously used by one of his stations, KGMO(FM), Cape Girardeau, Missouri. Withers makes clear in his Declaration that whereas WRAJ had permission to use his old tower, it has not received permission to use the new one.

Withers also points out that it was the obligation of WRAJ to determine whether or not the new tower could capacitate WRAJ's antenna, a task not fulfilled by WRAJ. More importantly, however, as the letter attached to Withers' Declaration attests, the tower will not support an additional FM antenna.

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In light of the facts now before the Commission, it is clear that the WRAJ application is not complete, and cannot be granted in its present mode, since WRAJ unarguably does not have authority to use the tower specified in its application.

In the Commission's Report and Order in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (Hard Look Order),¹ recon. denied, 50 Fed. Reg. 43157 (October 24, 1985), aff'd without published opinion, sub nom, Hilding v. FCC, 833 F.2d 1435 (9th Cir. 1987), the Commission makes clear that it does not allow amendments to correct tender defects. And, among the tender requirements are site availability, which does not exist here.

In light of the above, it is respectfully submitted that WRAJ's application is not grantable, and should be dismissed or made the subject of whatever further Commission inquiry or process that is deemed advisable under the relevant circumstances.

Please communicate with the undersigned should any question arise relative to this matter.

Sincerely yours,


B. Jay Baraff
Counsel for
W. Russell Withers, Jr.

Enclosures

cc: W. Jan Gay, Esq., FCC (w/enclosures) (by hand)
Mr. Dennis Williams, FCC (w/enclosures) (by hand)
Kathryn R. Schmeltzer, Esq. (Fisher, Wayland) (w/enclosures)

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¹While the hard look approach prohibits amendments to correct tender defects after the close of the filing window, where, as here, no such window exists, the application should be summarily dismissed.

SECTION VI - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

1. Does the applicant propose to employ five or more full-time employees?

N/A

☐ Yes ☐ No

If Yes, the applicant must include an EEO program called for in the separate Broadcast Equal Employment Opportunity Program Report (FCC 898-A).

SECTION VII - CERTIFICATIONS

1. Has or will the applicant comply with the public notice requirement of 47 C.F.R. Section 73.3550?

☐ N/A ☐ Yes ☐ No

2. Has the applicant reasonable assurance, in good faith, that the site or structure proposed in Section V of this form, as the location of its transmitting antenna, will be available to the applicant for the applicant's intended purpose?

☒ Yes ☐ No

If No, attach as an Exhibit, a full explanation.

Exhibit No.

☒ If reasonable assurance is not based on applicant's ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure.

Name of Person Contacted

J.W. Davis

Telephone No. (include area code)

(618) 985-2333

Person contacted: (check one box below)

☐ Owner

☒ Owner's Agent

☐ Other (specify)

4. The applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits pursuant to Section 5501 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. 853a, or, in the case of a non-individual applicant (e.g., corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits pursuant to that section. For the definition of a "party" for these purposes, see 47 C.F.R. Section 1.2002(b).

☒ Yes ☐ No

The APPLICANT hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with 47 C.F.R. Section 1.65, the APPLICANT has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

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DECLARATION

undertake some sort of stress test or investigation, and report back to him, which never happened. Rather, on his own initiative, Mr. Stratemeyer specified my new tower in his August 17 modification. Pursuant to our past practice, and in accordance with our agreement, even had the tower been found to be of sufficient strength to capacitate WRAJ, Mr. Davis would then have contacted me as to whether or not I wished to have WRAJ on my new tower.

It is not necessary from my point of view to look into the motivation of WRAJ for having made a statement to the Commission which at best is incomplete, and at worst is misleading and untrue. But I wish the Commission to understand quite clearly that WRAJ does not have permission to use my tower. and in fact I

10/14/92

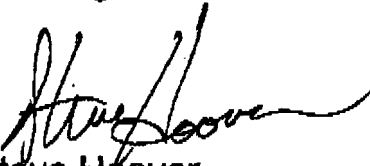


Mr. Russ Withers
Wither's Broadcasting
3501 Broadway
Mt. Vernon, IL 62864

Dear Mr. Withers,

Per our conversation of 10/9/92, I have reviewed the design information for your 770' guyed tower located near Cape Girardeau, MO (Central Tower, Inc. project #GT-116). The tower was originally designed to support one 10-bay SHP antenna with 4" heliax and one Scala PR450U at 200' with 1/2" heliax, and therefore is not capable of supporting an additional FM antenna. Please contact me at (812) 853-0595 if you have additional questions.

Best regards,


Steve Hoover
Desian Engineer